United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2007

To be argued by
ROBERT GOLD

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2007

UNITED STATES OF AMERICA,
Appellee,

—v.—

JUAN SERGIO SALAS,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

ROBERT GOLD,
GEORGE E. WILSON,
JOHN D. GORDAN, III,
Assistant United States Attorneys,
Of Counsel.

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Preliminary Statement

Juan Sergio Salas appeals from a judgment of conviction entered on June 21, 1974 in the United States District Court for the Southern District of New York after a two-day trial before the Honorable Robert L. Carter and a jury.

Indictment No. 73 Cr. 896, filed September 21, 1973, charged Salas in one count with having refused to submit to induction into the armed forces of the United States in violation of Title 50 Appendix, United States Code, Section 462(a).

Trial commenced on May 23, 1974, and on May 24, 1974 the jury returned its guilty verdict.

After trial the defendant, claiming irregularity in his call for induction by the local board, moved for (i) a

judgment of acquittal, pursuant to Rule 29, Fed. R. Crim. P. and (ii) arrest of judgment, pursuant to Rule 34, Fed. R. Crim. P. By endorsement and order, filed June 21, 1974, Judge Carter denied the motions. The same day, Judge Carter sentenced Salas to two years probation.

Statement of Facts

A. The Government's Case

The Government's proof at trial, consisting essentially of documents from Salas' Selective Service file introduced by Archie Spiegelman, an executive secretary for the Selective Service System, established the following sequence of events culminating in Salas' refusal to submit to induction on December 4, 1972.

On April 23, 1971, Salas registered with the Selective Service System at Local Board No. 19 in Kingston, New York. At that time he completed a Selective Service System Classification Questionnaire (GX 1, 2A), in which he supplied the following information: his date of birth was December 24, 1946; he had been admitted to the United States on February 16, 1971 as a permanent resident alien from Chile; at the time of his registration he was enrolled as a full-time student at Ulster Community College scheduled to complete his undergraduate studies in September, 1975; and, he did not have any physical or mental condition which would disqualify him for military service.

On April 23, 1971 Salas requested a student deferment. (GX 2A). On June 3, 1971, pursuant to Salas' request, he was classified 2-S by the unanimous vote of Local Board No. 19 and placed into the extended liability group (GX 2A; Tr. 27).

On June 4, 1971 a Notice of 2-S classification was mailed to Salas at 41 Center Street, Ellenville, New York, the address which he had earlier furnished to the local board (GX 2A).

On November 16, 1971, by unanimous vote, the local board reclassified Salas 1-A and on November 19, 1971 the board mailed him a Notice of 1-A Classification (GX 2A).

On January 11, 1972, again by unanimous vote, the local board reclassified Salas 2-S and mailed a Notice of 2-S Classification to him on January 20, 1972 (GX 2A).

This 2-S classification was apparently based on a Student Certificate from Ulster Community College (GX 2A-1) which certified that Salas was a full-time undergraduate student expected to receive a degree in or about August, 1972. This Student certificate was received by the local board on September 22, 1971 and was apparently misfiled and not acted upon by the local board until its January meeting when Salas was reclassified 2-S.

On July 17, 1972 the local board mailed to Salas an order to report for an armed forces physical examination on August 14, 1972 (GX 2B). Salas reported as ordered and claimed approximately twenty medical disabilities (GX 2D). Accordingly, on August 30, 1972 an order to report for re-examination on September 26, 1972 was mailed to Salas (GX 2C).

On September 12, 1972, by the unanimous vote of the local board, Salas was re-classified 1-A and a notice of 1-A reclassification was mailed to him on September 14, 1972 (GX 2A). This reclassification was apparently based on the Student Certificate (GX 2A-1) which indicated that Salas had completed his studies in August 1972.

On September 29, 1972 Salas was found fully acceptable for military service (GX 2D, 2E). On October 18, 1972 a notice to this effect was mailed to Salas (GX 2F).

On November 1, 1972 the local board mailed to Salas an order to report for induction on December 4, 1972 (GX 2G).

On November 17, 1972 Salas filed with the local board a power of attorney in favor of David Effron, Esq. (GX 2H). By letter dated November 20, 1972, Mr. Effron advised Salas' local board that application was being made to the State Director of Selective Service to postpone Salas' induction for a reasonable time to allow receipt of alleged medical and psychiatric information from Chile. Salas had never before advised the Selective Service System that he had psychiatric problems (GX 2A, 2D).

On November 24, 1972 the local board forwarded Salas' Selective Service file to State Headquarters for the State Director's review (GX 2J). By letter dated November 28, 1972, the local board was advised that the State Director had reviewed Salas' case and "declined to take any action delaying . . . [Salas'] induction" (GX 2J).

By letter dated November 29, 1972 (GX 2K), Salas and his attorney, Mr. Effron, were advised that the State Director had denied Salas application for an induction delay and that Salas was to report for induction on December 4, 1972.

On December 4, 1972, Salas failed to report for induction as ordered (GX 2L, 3).

B. The Defendant's Case

Salas did not testify in his own behalf. The sole defense witness was David Effron who stated that Salas had sought his counsel during the fall of 1972 and that he had advised Salas to attempt to obtain certain medical information from Chile which could be furnished to the medical authorities at the induction examining station (Tr. 104-5).

ARGUMENT

POINT I

Salas' claim that his induction order was invalid because his call for induction was improperly decelerated should have been raised prior to trial.

Salas advances the novel claim that his induction order was invalid because it came too late, his induction having been delayed for over a year by the unlawful action of the local board in granting Salas 2-S deferments to which he was not entitled.* Salas' brief (Point II) concedes that the defense was not raised before trial.

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* Salas' argument is based upon his interpretation of 32 C.F.R. 1622.25(a) which provides, in pertinent part, as follows:

> 1622.25 Class 2-S: Registrant Deferred Because of Activity in Study.—(a) In Class II-S shall be placed any registrant who has requested such deferment and who is satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning, such deferment to continue until such registrant completes the requirement for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth anniversary of the date of his birth, whichever occurs first.

On April 23, 1971 at which time Salas first requested a student deferment he was four months past his 24th birthday. Accord-

[Footnote continued on following page]

In *United States* v. *Strayhorn*, 471 F.2d 661, 665 (2d Cir. 1972)* this Court, in recognition that "the order of call defense, going as it does to the validity of the induction order, is properly heard by the Court, not the jury", established binding guidelines for the future invocation of the order of call defense:

> "Consequently, in light of the broad discovery permitted by the federal rules, the minimal initial burden placed on the defendant, and the technical nature of the defense, we hold that it is one properly raised before trial through a motion for a judgment of acquittal. . . . The district courts may deem the order of call defense waived, in trials beginning after January 1, 1973, if the issue is not raised in the above manner."

However, the requirement that defenses attacking the validity of induction orders be raised before trial is not limited to the order of call defense. In *United States* v. *Velazquez*, 490 F.2d 29, 42 (2d Cir. 1973)** Chief Judge Kaufman, in his dissenting opinion, rejected any such limitation:

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ingly, Salas argues that he was not entitled to a 2-S deferment and the Local Board should have ignored his request for one. We, of course concede that Salas was not entitled to a 2-S student deferment and the local board committed error in giving him such deferments albeit error in Salas' favor. See Point II, *infra*.

* Whereas in *Strayhorn*, *supra*, the defendant challenged the validity of his induction order based upon an alleged unfair acceleration in his call for induction, Salas now claims, in effect, that his induction order was invalid as a result of an improper deceleration in his call for induction.

** In *Velazquez*, *supra*, the defendant, apparently heeding the import of *Strayhorn*, moved pursuant to Rule 12, Fed. R. Crim. P., for dismissal of the indictment on the ground that he had not received adequate notice of his duty to report for a physical examination and, that, therefore, he had never been under an obligation to submit to such an order.

> "We set down in *Strayhorn,* for the guidance of trial courts in the future, a procedure in Selective Service prosecutions for dealing with defenses challenging the validity of Selective Service Orders, defenses which would ultimately determine the life or death of the case. There, we stated that the order-of-call defense, which attacks the validity of the local board's induction order, 'is one properly raised before trial through a motion for judgment of acquittal.' *United States* v. *Strayhorn, supra,* 471 F.2d at 665. The forceful reasons of judicial efficiency which led us to compel prospective defendants to assert the order-of-call defense prior to trial would certainly appear applicable as well to defenses attacking the issuance and mailing of Selective Service orders, such as that advanced here."

These considerations apply with equal vigor here. Salas failed to challenge the validity of his induction order prior to trial even though the invalidity now asserted was apparent from the face of Salas' file and thus required far less effort to raise than an order of call defense. No reason has ever been given for the failure to raise the defense now asserted in a timely fashion. Thus, it is clear that, pursuant to this Court's clear directives, Judge Carter properly denied Salas' post-trial motion as untimely. Salas should be similarly precluded from raising the claim on appeal.*

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* Salas concedes that in *United States* v. *Dudley,* 451 F.2d 1300, 1303 (6th Cir. 1971), upon which he relies, the defendant had raised the claim before trial. And, of course, the Sixth Circuit's decision therein pre-dates the guidelines established by this Court in *Strayhorn, supra.*

POINT II

Salas is not now entitled to claim prejudice from having been given 2-S deferments.

Having failed to convince the armed forces physicians that he was medically unfit for military service, and thereafter having unsuccessfully attempted to convince the jury that he did not wilfully attempt to evade military service, Salas now ironically claims that his induction order was invalid because the local board unfairly decelerated his call for induction by giving him a 2-S (student) deferment to which he was not entitled (thereby enabling him to complete his undergraduate studies prior to military service) instead of immediately removing him from college and subjecting him to induction. Concededly, the local board gave Salas far more than he was entitled to because, since Salas was over 24 years old, he was ineligible for a 2-S deferment.* The fact remains, however, that Salas was in no way prejudiced by being improperly deferred as a student in Class 2-S. Had the local board acted properly and classified Salas 1-A in June, 1971, it seems clear that he would either have been inducted in 1971, since, as he concedes, his draft lottery number 70 (095) was reached, or he would have had his induction postponed until the end of his 1971-1972 academic year pursuant to 50 U.S.C. App. § 456(i)(2).

Salas' principal argument is, however, that since he was properly classified 1-A on December 31, 1971, and was not ordered to report for induction in the first three months of 1972, he was entitled to be placed in the "lower priority selection group" from which he claims, and we agree, he would not have been drafted. 32 C.F.R. § 1631.7(d)(2) and (5). He also contends, and we agree, that the local

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* Needless to say, Salas did not complain of the local board's generosity while he was its beneficiary.

board could not deprive him of the limitation of his liability for induction under 32 C.F.R. § 1631.7(d)(5) by improperly reclassifying him 2-S in January, 1972. However, as noted *supra,* Salas was in no way prejudiced by his improper classification in January, 1972, for if the local board had classified him 1-A as required by the regulations, Salas' liability would still have been extended beyond the first three months of 1972, if not by his preinduction physical, then by the postponement of his induction under 50 U.S.C. App. § 456(i)(2) until the conclusion of his academic year in the late spring of 1972.* In short, the local board's error in reclassifying Salas 2-S in January, 1972, did not deprive him of the right to limit his prime liability for induction under 32 C.F.R. § 1631.7 to the year he was classified 1-A and the first three months of the following year.

It seems clear that the purpose of the lottery provision of the Selective Service regulations (32 C.F.R. § 1631) was not only to provide ascertainable limits to the period of significant liability to induction into the armed forces, *United States* v. *Born,* 338 F. Supp. 444, 447 (W.D. Mich. 1972), but also to see to it that those men whose lottery

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* The operation of 50 U.S.C. App. § 456(i)(2) is triggered by the issuance of an induction order, and Salas urges (Br. at 11) that the Court take judicial notice that for policy reasons of the Secretary of Defense no induction orders issued during the first three months of 1972. However, we submit that, assuming the correctness of his contention, the fact that no induction orders could be issued during the first three months of 1972 did not result in the assignment of those men in the Extended Priority Selection Group, defined in 32 C.F.R. § 1631.7(c)(1), during the first three months of 1972 to the "lower priority selection group", as provided by 32 C.F.R. § 1631.7(d)(5). Rather, it seems clear that such registrants continued in the Extended Priority Selection Group because, under 32 C.F.R. § 1631.7(d)(5), they "could not be issued orders" because of the "inability of the local board to act", and they were thus subject to induction orders beyond the first three months of 1972.

number was reached during the year they were classified 1-A were inducted regardless of the inefficiencies of the administrative process. To be sure, there may be some cases, such as *Born,* in which a different result from the one proper here may be required if a *denial* of the registrant's procedural rights has caused a delay in induction past the first three months after the year of prime liability. Here, however, when the delay results only from the local board's bestowing a benefit on a registrant to which he was not entitled, and when, in contrast to *Born,* the proper application of law by the local board *would* have resulted in the postponement of induction beyond the three months following the year of prime liability, a registrant should not be entitled to excuse his failure to report for induction by the fact that he was not obliged to report for induction until six months after the law required.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

ROBERT GOLD,
GEORGE E. WILSON,
JOHN D. GORDAN, III,
Assistant United States Attorneys, Of Counsel.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Patricia D. Burks being duly sworn, deposes and says that she is employed in the office of the United States Attorney for the Southern District of New York.

That on the 1st day of November, 1974 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Leavy & Shaw
Att for Appellant
233 B'Way
Suite 3303
New York, New York, 10007

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Patricia D Burks

Sworn to before me this

1st day of November, 1974

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1975